Supreme Court, U.S.
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No. 02-1778

IN THE

Supreme Court of the United States

ZHENHUAN MA, SHANG-TING SUNG, AIZHU SU and CHUNSHENG TIAN, On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

KAJIMA CORPORATION, KAJIMA CONSTRUCTION SERVICES, INC., KAJIMA DEVELOPMENT CORPORATION, KAJIMA ENGINEERING AND CONSTRUCTION, INC., KAJIMA INTERNATIONAL, INC., KAJIMA U.S.A., INC., MITSUI & CO., LTD., MITSU & CO. (USA), MITSUBISHI CORPORATION, MITSUBISHI INTERNATIONAL CORPORATION, MITSU MINING CO., LTD., MITSUI MINING USA INC., MITSUI MINING COMPANY, LTD., MITSUI & COMPANY (USA), INC. *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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After the Petition for Certiorari was filed, this Court on June 23, 2003, issued its first foreign-affairs preemption decision in the more than three decades since *Zschernig v. Miller*, 389 U.S. 429 (1968). But the Court's 5-4 split decision in *American Ins. Ass'n v. Garamendi*, U.S. No. 02-722, slip op. (June 23, 2003), did not exactly clarify the law on when the general federal power over foreign affairs will operate to preempt specific state laws. For in *Garamendi*, this Court refused either to overrule, or to endorse, broad language about foreign-affairs preemption in the *Zschernig* majority opinion—opting instead to apply the standards from Justice Harlan's concurrence and Justice White's dissent in *Zschernig*. *See Garamendi*, slip op. at 21; *Zschernig*, 389 U.S. at 462 (White, J. dissenting); *id.* at 443-62 (Harlan, J., concurring). *Garamendi* thereby leaves the really controlling rules of law in considerable doubt. Does the Harlan concurrence state the law? Or the *Zschernig* majority? The *Garamendi* majority opinion leaves an important area of constitutional law in doubt.

And yet, it is clear that the analysis actually applied by the *Garamendi* majority conflicts dramatically with the Ninth Circuit's reasoning in the decision below. The *Garamendi* majority opinion, by refusing to endorse expansive expressions on foreign affairs preemption in the *Zschernig* majority opinion—and opting instead to apply the standards articulated in Justice Harlan's concurrence and Justice White's dissent—narrowed the focus of its foreign-affairs preemption analysis to emphasize ***actual conflict*** with express executive policies embodied in formal executive agreements designed to resolve the very matters at issue. "Judged by these standards," the majority writes, "we think petitioners and the Government have demonstrated a sufficiently ***clear conflict*** to require finding preemption here." *Garamendi*, slip op. at 18, 21 (emphasis added). Moreover, the *Garamendi* majority emphasizes that where "a State has acted within what Justice Harlan called its 'traditional competence,' but in a way that affects

foreign relations, it might make good sense ***to require a conflict***, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." *Garamendi*, slip op. at 20 n.11 (emphasis added; citation omitted).

As the Petition points out, § 354.6 of the California Code of Civil Procedure governs when a State's courts may adjudicate certain claims that arose abroad—an important matter resting at the very core of the State's "traditional competence." For each state is entitled to "determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders." *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 285 (1908). "The state policy decides whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions." *General Oil Co. v. Crain*, 209 U.S. 211, 224 (1908); *accord Chalmers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907). State policy traditionally governs what the time for filing such claims shall be as well—without regard to whether they are timely under foreign law. *See Sun Oil v. Wortman*, 486 U.S. 717, 723-26 (1988); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 538 (1868); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327-28 (1839).

Thus, *Garamendi* requires—at the very least—a balancing of California's strong local interest in regulating its courts and the time for filing suit in them, against any federal policies concerning the Chinese plaintiffs' claims in this case. That is something that the Ninth Circuit has refused to do.[1]

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[1] The Ninth Circuit's March 6, 2003, Order denying rehearing and amending the opinion in this case closed: "The mandate will be held pending a decision in *American Insurance Association v. Low [Garamendi]*, __ U.S. __, 123 S. Ct. 817, 154 L. Ed. 2d 768 (2003) (No. 02-

The Ninth Circuit ruled that California Code of Civil Procedure § 354.6 is unconstitutional on the incredibly broad ground that the provision concerns claims based on "acts that took place during the years leading up to the war and during the years of the war itself." Pet. App. at 41a.

The Ninth Circuit's analysis would invalidate many other provisions—including those tolling limitations periods on claims arising before and during times of war.[2] Its decision in this case cannot be reconciled with the many decisions recognizing the wartime suspension of state limitations periods—including this Court's decision in *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 542 (1868). "Peace restores the right and the remedy," this Court held in *Hanger*, "and as that cannot be if the limitation continues to run . . . it necessarily follows that the operation of the statute" of limitations is also suspended

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722) (granting certiorari)." *Deutsch v. Turner Corp.*, 324 F.3d 692, 703 (9th Cir. 2003). Yet the Ninth Circuit subsequently ***refused*** to permit supplemental briefing on *Garamendi's* significance, issuing its mandate on July 30, 2003. *See* Opp. at 12-13.

[2] *See, e.g.*, Cal. Code Civ. Proc. § 354 ("When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of the continuance of such disability is not part of the period limited for the commencement of the action whether such cause of action shall have accrued prior to or during the period of such disability."); N.J. Stat. § 2A:14-26 (2003) ("The period of service, in time of war and 6 months thereafter, of any person, in active service in any of the armed forces of the United States, or the women's auxiliary corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with its armed forces, shall not be included in computing any period limited on April 16, 1945, or thereafter by any law for the bringing of any action by or against any such person or by or against his heirs, executors, administrators or assigns, whether such cause of action shall have accrued prior to, or during, the period of such Service or during such 6 months thereafter.")

during war time.[3] According to the Ninth Circuit, peace ***abolishes*** the right and remedy, precluding state courts from hearing claims that arose before or during wartime.

This Court's majority opinion in *Garamendi*, by contrast, found California's Holocaust Victim Insurance Relief Act ("HVIRA") preempted not because it merely concerned wartime wrongs, but because it ***directly conflicted*** with foreign policy embodied in ***specific executive agreements*** designed to resolve claims based on Nazi-era insurance policies. Preemption resulted from actual conflict between the California law at issue, and specific federal initiatives to resolve Holocaust-era insurance claims:

- "The ***exercise of the federal executive authority*** means that state law must give way where, as here, there is evidence of ***clear conflict*** between the policies adopted by the two." *Id.* at 22 (emphasis added).
- "As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of [insurance] policy information." *Id.* at 23.

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[3] *Id.*; *accord, e.g.*, *Estate of Caravas*, 40 Cal. 2d 33, 40-41, 250 P.2d 593 (1952) (following *Hanger*); *Louisville & N. Ry. Co. v. Buckner*, 71 Ky. 277, 282 (1871) ("Although, as a general rule, the existence of a state of war suspends alike commercial intercourse and civil rights and remedies as between antagonist enemies, it does not destroy but only suspends their relative rights; and when the war ceases the one is remitted to his remedies against the other as if no suspension had occurred, and may maintain his action for the recovery of property or wrongs committed thereon, or for the use and occupation thereof."); *Feil v. Senisi*, 7 N.J. Super. 517, 72 A.2d 348 (1950); *Maryland Cas. Co. v. Vidigoj*, 207 Ky. 841, 270 S.W. 472 (1925).

- "***The question relevant to preemption in this case is conflict***, and the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.'" *Id.* at 28-29 (emphasis added, citation omitted).

Rather than finding preemption on the basis that claims arose "during the years leading up to the war and during the years of the war itself," Pet. App. at 41a, the *Garamendi* majority emphasized that "valid executive agreements are fit to preempt state law," *Garamendi*, slip op. at 17, and that applying HVIRA on the facts presented would conflict with specific policies embodied in specific executive agreements designed to resolve Holocaust-related insurance claims by specific means—through a Foundation created with the cooperation of the United States and other governments. The insurance-related claims in *Garamendi* were subject to resolution by Executive Agreement and an international Foundation created by negotiations among the United States, with five Central and Eastern European countries, Israel, and the non-governmental Conference on Jewish Material Claims Against Germany for the purpose of making payments to people who suffered at the hands of German companies during the Nazi era.

Had the United States engaged in similar negotiations to resolve Chinese victims of Japanese corporations' forced labor, petitioners' claims might be similarly preempted. For "wartime claims against even nominally private entities have become issues in international diplomacy," that ***may be*** resolved by diplomatic action. *Garamendi*, slip op. at 16. But the United States chose a different course when it came to the claims of Chinese civilians at issue here, sharply distinguishing their claims from the insurance-related claims in *Garamendi*. But where, as here, the United States has ***never***

exercised federal executive authority to resolve the Chinese plaintiffs' claims, no conflict arises.[4]

The Chinese plaintiffs-appellants' claims in this case present no conflict at all with federal policies designed to resolve their claims by other means. For the Chinese plaintiffs' claims are not the subject of executive agreements undertaking to resolve them without litigation. Nor are they the subject of any federal treaty or legislation designed either to resolve or to bar them—as the district court found. *See* Pet. App. at 112a-118a (*In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1165-68 (N.D. Cal. 2001)). The treaty's drafters clearly understood that because the Chinese and Korean governments were not even parties to that treaty, they had ***no authority*** to waive or otherwise bar claims of Korean or Chinese nationals.[5] There is no basis for re-writing the treaty now, to bar assertion of Chinese nationals' claims.[6]

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[4] The Ninth Circuit's opinion notes that "[t]he grievances of at least one class of potential plaintiffs identified in section 354.6, prisoners of war, were addressed by the federal government in domestic legislation," the War Claims Act of 1948, under which "assets seized from Germany, Japan, or their nationals within the United States and its territory were used to compensate American prisoners of war whose rights had been violated." Pet. App. at 46a. But this legislation clearly did not address the claims of Chinese civilians forced to labor by Japanese companies.

[5] Because the 1951 treaty defines "Allied Power" to exclude countries like China and Korea, that did not ratify it, *see* Opp. at 19a, when Article 14(b) waived "reparations claims of the Allied Powers" arising from "prosecution of the war," Opp. at 12a-13a, the waiver could have had "no effect on the claims of nationals from non-signatory nations." Pet. App. at 117a. [164 F. Supp. 2d at 1167.] The 1951 treaty's text itself indicates "that the signatory nations, including the federal government of the United States, did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations." Pet. App. at 118a [164 F. Supp. 2d at 1168.]

[6] *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) ("'[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or

Defendants insist that the 1951 treaty's Article 26 says "Japan will be prepared to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same . . . terms as are provided for in the present Treaty." Opp. at 19a-20a. While this limited Japan's ability to treat other nations less favorably than it had treated signatories of the 1951 treaty, it said nothing to bar Chinese citizens' tort and contract claims against private corporations, let alone bar those claims by committing them "to diplomacy." Defendants also cite Article 4(a), which merely required Japan to deal with the "authorities presently administering such areas" as were identified in Article 2, over which Imperial Japan had lately claimed sovereignty but now "renounce[d] all right, title and claim."[7] It did not require any of those authorities to waive their citizens' claims for war-era wrongs.

Defendants say Chinese civilians' claims are barred either by the April 28, 1952, Treaty of Peace between Japan and Taiwan, or else by a September 29, 1972, Joint Communiqué issued by the governments of Japan and the People's Republic of China. Opp. at 31a-34a. But the closest thing to a waiver or settlement of claims that defendants can find in the 1952 Japan-Taiwan treaty is Article XI's provision that "any problem arising between the Republic of China [*i.e.*, Taiwan] and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty." Opp. at 29a. Defendants never explain why litigation between private parties would be a "problem"

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great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions.'") (citations omitted). *United States v. Alvarez-Machain*, 504 U.S. 655, 665-66 (1992) (refusing to supplement treaty with new implied terms).

[7] Opp. at 3a. Those territories included Korea, "Formosa and the Pescadores" (*i.e.*, Taiwan), the Kurile Islands and Sabhalin, the Spratley Islands, Ponacel Islands, and other "Pacific Islands formerly under mandate to Japan." Opp. at 2a-3a (Article 2).

between Japan and Taiwan, let alone what might be "the relevant provisions of the San Francisco Treaty" dealing with that "problem." The 1952 Japan-Taiwan treaty and the 1951 treaty both leave the Chinese plaintiffs' claims unresolved.

Moreover, although the 1951 treaty had required Japan to renounce any claim to "Formosa and the Pescadores," or Taiwan, and to be amenable to "special arrangements" with "the authorities presently administering such areas," Opp. at 2a-3a, nothing in it authorized Taiwan to speak on behalf of the mainland Chinese. China was not a party to the 1951 treaty precisely ***because*** Taiwan could not speak on behalf of, or otherwise bind, the people of mainland China.[8] And Japan's 1972 Joint Communiqué with the People's Republic of China flatly ***repudiated*** Taiwan's ability to speak for all Chinese nationals, announcing that "[t]he Government of Japan recognizes [the] Government of the People's Republic of China as the sole legal Government of China." Opp. at 32a.

Without mentioning individual claims of Chinese citizens, the Communiqué said: "***The Government*** of the People's Republic of China . . . renounces ***its*** demand for ***war reparation*** from Japan." Opp. at 33a (emphasis added). But in contexts like this, the term "reparation" refers to "[p]ayment made ***by one country to another*** for damages during war," Joseph R. Nolan, *et al.*, *Black's Law Dictionary* 1298 (6th ed. 1990) (emphasis added), and not to individuals' tort or contract claims against other private parties. The 1972 Joint Communiqué said nothing about claims by individual forced-labor victims, let alone purporting to waive or extinguish

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[8] The official Record of Proceedings emphasized that "there is not general international agreement upon a single Chinese voice with both the right and the power to bind the Chinese nation." United States Department of State Publications, *Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan* 85 (1951) (statement of John Foster Dulles); *see* Opp. at 8.

those claims.[9] And when Japan and China finally entered into a treaty of peace and friendship in 1978, it provided that "all disputes shall be settled by peaceful means." Opp. at 36a. Surely, this does not bar private litigation between Chinese nationals and Japanese corporations.

Quite recently, moreover, a Japanese court upheld claims asserted by 15 Chinese men forced to labor for Mitsui Mining Co. during the Second World War, ordering Mitsui to pay its former slaves 165 million yen—nearly $1.3 million—in damages.[10] Although the Japanese government was immune, Mitsui—as a private company—remained accountable for its war-era acts.[11]

Yet, under the reasoning of the decision below, those claims are barred by the foreign-affairs power of the United States. This Court should issue a writ of certiorari to review this case. At a minimum, the Ninth Circuit should be directed to reconsider its decision in light of *Garamendi*.

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[9] Defendants' own expert questioned whether the parties ***could even have conceived*** that they were waiving Chinese nationals' individual claims. *See* SER 474 ¶9.

[10] *See Forced Laborers Win Suit: Mitsui Mining Ordered To Pay 165 Million Yen*, The Japan Times Online, *at* http://www.japantimes.co.jp/cgi-bin/getarticle.p15?nn20020427a1.htm (Apr. 27, 2002).

[11] *Id.*; *see also* Hiroshi Matsubara, *Mitsui Case Breaks New Ground For Wartime Redress*, The Japan Times Online, *at* http://www.japantimes.co.jp/cgi-bin/getarticle.p15?nn20020427a9.htm (Apr. 27, 2002).

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